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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN JACKSON, JR.

Defendant and Appellant.

2d Crim. No. B242121  
(Super. Ct. No. KA094728)  
(Los Angeles County)

Bryan Jackson, Jr. appeals from a judgment after conviction by jury of one count of attempted voluntary manslaughter (Pen. Code, §§ 664/192, subd. (a)).<sup>1</sup> This was a lesser included offense to the charged crime, attempted murder, for which the jury found Jackson not guilty (§§ 664/187, subd. (a)). The jury found true the allegations that Jackson personally used a firearm and committed the offense for the benefit of a criminal street gang. (§§ 12022.5, subd. (a), 186.22, subd. (b)(1)(C).) The trial court sentenced Jackson to 20 years and 6 months in state prison.

Jackson contends the trial court (1) violated his Sixth Amendment right to counsel when it admitted a recorded statement that he made to an undercover police officer while he was in jail (*Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*));

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

and (2) erred when it refused his request for a jury instruction on assault with a deadly weapon as a lesser included offense to attempted murder. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

Jackson is a member of the Rascals clique of the Eastside Bolen Park gang. Omar Gomez is a member of a rival gang, Desmadres.

One evening, Jackson walked into an Easymart store in Baldwin Park. Gomez and his girlfriend were buying beer. Jackson got into the line behind Gomez. The store owner, Samuel Leang, was behind the counter.

Jackson and Gomez spoke to each other. Gomez hit Jackson. The two men fought. Gomez was not armed. Leang heard a gunshot. Gomez and Jackson ran out of the store and left in separate cars. Gomez later discovered he had been shot in the neck. Jackson's image was captured on a video surveillance camera. Leang also identified Jackson. Gomez testified, but did not identify Jackson.

After Jackson was arrested, but before a complaint was filed against him, an undercover police detective wearing a wire entered Jackson's jail cell posing as a cellmate. Jackson told the detective about the fight. Jackson said that when he was standing behind Gomez in line, Gomez said "[W]hat's up, homey, you bang?" Jackson was surprised because Gomez did not look like a gang member. Jackson told the detective that when Gomez rushed him, he responded by trying to shoot him: "I was like Eastside Baldwin, fool, and fucking . . . start swinging, the fool . . . got me right here, first with the - he slammed me with a key and shit. I got mad, fool, so fucking I hit him. I took out my strap, bam, cracked him with it, pow . . . ." Each man identified his gang before they fought: "I told [Gomez] the neighborhood and shit and he was like, oh, is that right. And as soon as he said, I took a step back and put my hand in my pocket. And I was like what's up and then he said Desmadre and he rushed me." Jackson said he first tried to shoot Gomez with the safety on, he took the safety off, and then he fired again: "When I took it out, I had a safety first. And you know, so I pulled, pow, I was like, oh fuck, like it didn't shoot, you know. That's why I packed - boom, when I hit him with the

strap. And I took the safety, I was like, boom. I just let him have it." Jackson said of his gang, "we're gunners," and "every Rascal has to be a gunner to get jumped in."

At trial, Gomez testified that he did not recognize Jackson, he did not remember why they fought, and he was not sure if the other person was armed. Gomez testified that he heard a shot during the fight and his ears started ringing.

The parties stipulated that the Rascals clique of the Eastside Bolen Park Gang is a criminal street gang with a pattern of criminal gang activity. An expert witness for the prosecution offered the opinion that Jackson acted for the benefit or at the direction of the Rascals.

Jackson moved to exclude the recorded statement on the ground that Detective Leon did not give him a *Miranda* warning. (*Miranda v. Arizona* (1966) 384 U.S. 436.) The trial court denied the motion, finding that there was no custodial interrogation and the situation was not coercive because Jackson was unaware that he was speaking to a law enforcement agent. The court also observed that most of Jackson's statements to Leon were spontaneous, he "rambled on and on and on and on," and did "90 percent of the talking."

## DISCUSSION

### *Recorded Statement*

Jackson contends that use of his recorded statements to an undercover police detective violated his Sixth Amendment right to counsel. (*Massiah, supra*, 377 U.S. at p. 207.) He did not preserve his contention for appellate review by objecting on that ground in the trial court. (*People v. Roldan* (2005) 35 Cal.4th 646, 736, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The omission does not constitute ineffective assistance of counsel because Jackson's *Massiah* claim has no merit.

A defendant's Sixth Amendment right to have counsel present during police questioning attaches upon the commencement of formal judicial proceedings on the charges. (*Kirby v. Illinois* (1972) 406 U.S. 682, 688-690.) A defendant's own incriminating statements, deliberately elicited by an undercover law enforcement agent

after the commencement of formal judicial proceedings, cannot constitutionally be used by the prosecution as evidence against him at his trial. (*Massiah, supra*, 377 U.S. at p. 207.) In California, formal judicial proceedings commence upon the filing of the complaint. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1198-1199.) The Los Angeles County District Attorney's Office filed the felony complaint in this case on June 28, 2011. Jackson made the incriminating statements to Detective Leon one day earlier, on June 27, 2011. *Massiah* does not apply.

*Instruction on Assault with a Deadly Weapon*

Jackson contends the court erred when it refused to instruct on assault with a deadly weapon as a lesser necessarily included offense to attempted murder. We disagree. Assault with a deadly weapon is not a lesser necessarily include offense of attempted murder. (*People v. Parks* (2004) 118 Cal.App.4th 1, 6.) A person can attempt to kill someone without using a deadly weapon. A firearm use enhancement may not be considered when determining whether an offense is necessarily included. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Bruce F. Marrs, Judge  
Superior Court County of Los Angeles

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A. William Bartz, Jr., under appointment by the Court of Appeal, for  
Defendant and Appellant.

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